Office - Supreme Court, U.S.
FILED
JAN 21 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1026

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES U. RUPPERT,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

JOHN F. HOLCOMB
Prosecuting Attorney
Butler County, Ohio

DANIEL G. EICHEL
Assistant Prosecuting Attorney
Butler County, Ohio
Butler County Court House
P.O. Box 515
Hamilton, Ohio 45012
Telephone (513) 867-5722

Attorneys for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

I

QUESTION PRESENTED

Where a conviction is reversed solely on the ground that an accused did not knowingly, intelligently and voluntarily waive his right to a trial by jury, and a new trial is awarded on appeal, does the retrial constitute double jeopardy within the meaning of the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	3
Where a conviction is reversed solely on the ground that an accused did not knowingly, intelligently and voluntarily waive his right to a trial by jury, and a new trial is awarded on appeal, the retrial does not constitute double jeopardy within the meaning of the Fifth Amendment to the United States Constitution.	3
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Bell v. *Ohio*, 438 U.S. 637 (1978)	7
Burks v. *United States*, 437 U.S. 1 (1978)	4-5
Grafton v. *United States*, 206 U.S. 333 (1907)	6
Lockett v. *Ohio*, 438 U.S. 586 (1978)	7
State v. *Cotton*, 56 Ohio St. 2d 8, 381 NE 2d 190 (1978)	7
State v. *Rose*, 89 Ohio St. 383, 106 NE 50 (1914)	6
State v. *Ruppert*, 54 Ohio St. 2d 263, 375 NE 2d 1250 (1978)	4, 6, 7
Sutcliffe v. *State*, 18 Ohio 469 (1849)	4
United States v. *Ball*, 163 U.S. 662 (1896)	4, 5
United States v. *Scott*, 437 U.S. 82 (1978)	4
United States v. *Tateo*, 377 U.S. 463 (1964)	5

Statutes:

Ohio Revised Code Section 2945.06	2, 6, 7

No. 81-1026

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES U. RUPPERT,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Respondent, State of Ohio, prays that a petition for a writ of certiorari herein be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for Butler County, Twelfth Appellate District of Ohio, is unreported and is appended to the petition at Appendix 1. The judgment entry of the Supreme Court of Ohio overruling Petitioner's motion for leave to appeal and dismissing said appeal are appended to the petition at Appendix 9.

The previous relevant decision of the Supreme Court of Ohio is reported at 54 Ohio St. 2d 263, 375 NE 2d 1250

(1978). This Court's memorandum decision denying certiorari is reported at 439 U.S. 954 (1978). (*Ohio* v. *Ruppert,* Case No. 78-254.)

STATEMENT OF THE CASE

James U. Ruppert was indicted by the April, 1975 session of the Butler County Grand Jury upon eleven counts of Aggravated Murder, in violation of Ohio Revised Code Section 2903.01 (A), with specifications contrary to Revised Code Section 2929.04 (A) (5), the eleven homicides occurring on Easter Sunday, March 30, 1975. On June 6, 1975, Ruppert entered a written waiver of jury trial, a three-judge court consisting of Butler County Common Pleas Judges Cramer, Fiehrer and Marrs was empaneled pursuant to Ohio Revised Code Section 2945.06, and on June 16, 1975, trial commenced with a reaffirmation of the jury waiver. On July 3, 1975, the Court's finding of guilty as charged to each of the eleven counts with specification was entered, a majority of the court so finding. On July 14, 1975, the judgment of conviction as to eleven consecutive terms of life imprisonment was imposed.

Subsequently, on August 22, 1975, a motion for new trial was heard and overruled on the issue, *inter alia,* whether the jury waiver was knowing, intelligent and voluntary. From such judgment, direct appeal was brought to the Court of Appeals, First Appellate District of Ohio, which held that the waiver of trial by jury was not knowingly, intelligently and voluntarily made; seven other assignments of error on appeal, including whether the evidence was sufficient to sustain the conviction as to eleven counts of aggravated murder, were overruled, and the Court of Appeals reversed and expressly remanded the cause for a new trial.

The Supreme Court of Ohio affirmed, 54 Ohio St. 2d 263, 375 NE 2d 1250 (1978). The Supreme Court of the United States denied certiorari, 439 U.S. 954 (1978).

Pursuant to the mandate of the Court of Appeals, the cause was remanded for a new trial; Honorable A. Ross Siverling, sitting by assignment, granted a motion for change of venue and overruled a motion for an acquittal on the grounds of double jeopardy, entered on April 17, 1980. An appeal followed, and the Court of Appeals for Butler County affirmed the judgment of the trial court on June 26, 1981. The Supreme Court of Ohio denied a motion for leave to appeal on October 21, 1981.

The petition, filed in this Court on December 3, 1981, was received by Respondent by ordinary mail on December 28, 1981.

REASONS WHY THE WRIT SHOULD BE DENIED

Where a conviction is reversed solely on the ground that an accused did not knowingly, intelligently and voluntarily waive his right to a trial by jury, and a new trial is awarded on appeal, the retrial does not constitute double jeopardy within the meaning of the Fifth Amendment to the United States Constitution.

Petitioner Ruppert's successful appeal of the judgment of conviction was based solely on an error in the proceedings, with the Court of Appeals expressly holding the evidence at the first trial sufficient to support a verdict of guilt; as such, there is no bar to further prosecution on the same charges. Simply put, the reversal of the 1975 conviction was initiated by the Petitioner's motion for a new trial, grounded on the validity of his waiver of trial

by jury and election to be tried by a three-judge panel. The Court of Appeals and Supreme Court of Ohio expressly remanded the matter for a new trial solely on this ground. *State* v. *Ruppert,* 54 Ohio St. 2d 263, 375 NE 2d 1250 (1978).

The principle that the Double Jeopardy Clause of the Ohio Bill of Rights, Ohio Const. Art. I § 10, does not preclude a retrial of a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of Ohio's constitutional jurisprudence, *Sutcliffe* v. *State,* 18 Ohio 469, 477-479 (1849). This principle is likewise firmly established in federal constitutional law under the Fifth Amendment's Double Jeopardy Clause, recognized in cases from *United States* v. *Ball,* 163 U.S. 662, 671-672 (1896), to *United States* v. *Scott,* 437 U.S. 82, 88-89 (1978).

Only one instance emerges in which an appellate reversal of a conviction will preclude a retrial; this is where an appellate court has determined that in a prior trial the evidence was insufficient to sustain a verdict of guilty. In *Burks* v. *United States,* 437 U.S. 1 (1978), the Supreme Court thoroughly discussed the history and purpose of the Double Jeopardy Clause, concluding that a reviewing court's reversal for insufficiency of the evidence should bar a subsequent prosecution. However, the Court distinguished evidentiary sufficiency from a reversal for trial error, which implies nothing as to the guilt or innocence of the defendant. Rather, such reversal for trial error "is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect . . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." 437 U.S. at 15. Thus, the Court emphasized:

> We have no doubt that Ball was correct in allowing a new trial to rectify *trial error* . . . . 437 at 14 (emphasis per the Court).

In the case at bar, Ruppert's claim that he was deprived of his right to a trial by jury was sustained on appeal, the Court of Appeals noting that essential unfairness in the trial proceedings was demonstrated. Significantly, however, on Ruppert's eighth assignment of error, the Court of Appeals stated, "we cannot say that as a matter of law the evidence was insufficient to sustain the conviction . . . ." This cause therefore clearly demonstrates, in classic form, the principle that a retrial after reversal on grounds of trial error is not barred by the Double Jeopardy Clause.

The case most analogous is *United States* v. *Tateo,* 377 U.S. 463 (1964), cited with approval in *Burks,* where a defendant was induced to enter a guilty plea on the fourth day of a jury trial by comments of the trial judge and defense counsel that if convicted he would be given "the absolute maximum sentence," life imprisonment. In subsequent federal habeas corpus proceedings the guilty plea and conviction were set aside, the plea having been coerced and involuntary due to the trial judge's comments. The Supreme Court held that the case fell squarely within the reasoning of *Ball* and subsequent cases allowing retrial of persons whose convictions have been overruled for error in the proceedings, and advanced in justification of the policy of allowing retrial to correct trial error:

> It would be a high price indeed for society to pay where every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. Id. at 46..

As in *Tateo,* Ruppert's waiver of trial by jury was induced by comments of the trial judge and defense counsel,

and was therefore not a knowing, intelligent and voluntary waiver. The reversal was to correct this trial error *which voided the entire proceedings thereafter,* notwithstanding the same court's judgment that the state's evidence was sufficient for conviction. The Court of Appeals mandate, reversing and remanding with a direction of a new trial, was the just and proper disposition, and pursuant to this mandate Petitioner Ruppert should stand trial on the indictment for eleven counts of aggravated murder.

Again, it is a long-established rule in Ohio as well as federal jurisprudence that an accused can premise a claim of former jeopardy a prior court proceeding only if that court had jurisdiction to try him for the crime charged. *State* v. *Rose,* 89 Ohio St. 383, 386, 106 NE 50, 51 (1914); *Grafton* v. *United States,* 206 U.S. 333, 345 (1907). Petitioner, attempting Judge Cramer's dissenting panel vote as an "acquittal," ignores the basic logic that the entire proceedings after his jury waiver were held invalid because of Judge Cramer's misinformation. The proceedings before the three-judge panel having been invalid, jeopardy did not attach, especially where the accused himself sets in motion the proceedings which nullified the judgment.

It is clear that the dissenting vote of Judge Cramer had no effect whatsoever as an "acquittal." Section 2945.06 was held to be jurisdictional, *State* v. *Ruppert,* 54 Ohio St. 2d at 269; to obtain jurisdiction a three-judge panel or a single judge sitting without a jury must be invoked by a *valid* waiver of jury trial. As it was held that Ruppert's jury waiver was invalid, neither a three-judge nor a judge sitting without a jury could possess jurisdiction to decide questions of fact or law. Thus, the dissenting vote of Judge Cramer was a complete nullity.

Parenthetically, it is without doubt that if Ruppert had knowingly, intelligently and voluntarily waived a trial by

jury and invoked the three-judge panel, the conviction upon a majority vote of the panel have been upheld. *State* v. *Ruppert,* 54 Ohio St. 2d 263, 375 NE 2d 1250 (1978), syllabus paragraph one. At the time of the offense and trial, Ruppert was indeed "*charged* with an offense punishable with death," and the provisions of Section 2945.06 of the Revised Code were applied to this case, as in many cases, including *Bell* v. *Ohio,* 438 U.S. 637 (1978). In the wake of *Bell* and *Lockett* v. *Ohio,* 438 U.S. 586 (1978), cases tried before three-judge panels were not reversed but were modified from death sentences to life imprisonment. *See, e.g., State* v. *Cotton,* 56 Ohio St. 2d 8, 381 NE 2d 190 (1978). Thus, the argument of counsel that *Lockett* and *Bell* rendered three judge panels unconstitutional is simply incorrect. *Lockett* and *Bell* declared unconstitutional only the *imposition* of a death sentence, leaving unaffected the matter of presentence trial procedure set forth in § 2945.06.

CONCLUSION

Because the decision of the Ohio court below is consistent with the applicable decisions of this Court, and no allegation is made in the petition for certiorari that there is a conflict between the decision in this case and any decision of another state court or a federal court of appeals, this Court should decline to review the instant case.

Petitioner Ruppert's application for certiorari should be denied.

Respectfully submitted,

JOHN F. HOLCOMB
Prosecuting Attorney
Butler County, Ohio

DANIEL G. EICHEL
Assistant Prosecuting Attorney
Butler County, Ohio

Attorneys for Respondent

Butler County Court House
P.O. Box 515
Hamilton, Ohio 45012
Telephone (513) 867-5722